Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 420

CHARLES McDANIEL, et al.,

Petitioners,

VS:

JOSEPH BARRESI, JR., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

MOTION FOR LEAVE TO FILE REPLY BRIEF AND TO DISPENSE WITH PRINTING

Respondents move for leave, pursuant to Rule 41(3), to file reply brief, on the ground that certain questions were asked counsel for respondents during oral argument which were not answered due to lack of time. Respondents move for an order dispensing with the printing of this reply brief on the same grounds previously stated in connection with respondents' motion to dispense with printing of the original brief.

previously granted by this Court. The reply brief of respondents for which leave is sought is attached hereto.

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REPLY BRIEF ON BEHALF OF RESPONDENTS

During oral argument, counsel for respondents advised the Court, particularly Mr. Justice White, that some remarks would be addressed to the question as to whether a state might, independent of any federal compulsion as involved in this case, undertake to alleviate racial imbalance in the public schools, and as a means thereof, assign both white and Negro children to school on the basis of race. However, due to the fact that so much of counsel's time was involved with answering other questions, he was unable to direct any remarks to these questions. This brief will deal with this question.

(1) Alleviation of Racial Imbalance

Some lower-court cases holding that school boards may validly assign pupils so as to achieve racial balance are cited at page 37 of respondents' original brief, in footnote 11.

It is respondents' position that these cases are not correct, and that the racial assignment of children to schools to achieve either segregation or racial balance is no longer permissible after Brown. We point out again, however, that the question is not presented in this case, for here the Clarke County Board of Education acted pursuant to compulsion of HEW (A. 97) in pending Title 6 enforcement proceedings (A. 165) following rejection by HEW on June 30 (A. 223) of a pure neighborhood plan (A. 167) which eliminated all all-black schools, and which respondents contend was clearly a valid and sufficient plan.

With respect to respondents' contention that voluntary assignment of pupils to achieve racial balance is now unconstitutional, we concede that this Court has not yet specifically declared that racial classifications are per se invalid. Indeed, in Hirabayashi v. United States, 320 U.S. 81 (1943) and Korematsu v. United States, 323 U.S. 214 (1944), this Court upheld racial classifications, but in the Hirabayashi case, the Court's opinion made it clear that the classification would not have been upheld except in the context of an exercise of Congress' war power during a time of declared war. 320 U.S. at 100.

This Court's decision in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) also did not state specifically that racial classifications per se are invalid, and while some language was utilized which is subject to the possible construction that the classifications were there condemned because of a particularized evidentiary finding (347 U.S. at 494), the cases which immediately followed, striking down segregation in such unrelated, non psychologically-oriented facilities as parks and golf courses, admit of no such construction, but tend instead to support the view that racial classifications are per se invalid. This is the view of the Court of Appeals for the Fifth Circuit. United States v. Jefferson County Board of Education, 372 F2d 836 at 876.

Racial classifications were also considered in McLaughlin v. Florida, 379 U.S. 184 (1964) and Loving v. Virginia, 388 U.S. 1 (1967). In the former case, two justices stated their individual opinions to be that racial classifications were per se invalid if found in criminal statutes, and in the Loving case, the Court's opinion, in striking down the Virginia miscegenation statute, used language expressing doubt that any racial classification would be valid (388 U.S. at 11). See also Muir v. Louisville Park Theatrical Association, 347 U.S. 971 (1954); Dawson v. M &c. of Baltimore, 350 U.S. 877 (1955); Gayle v. Browder, 352 U.S. 903 (1956); Holmes v. Atlanta, 350 U.S. 879 (1955); Virginia

Board of Elections v. Hamm, 379 U.S. 19 (1964); Anderson v. Martin, 375 U.S. 399 (1964); Watson v. Memphis, 373 U.S. 529 (1963); Lee v. Washington, 390 U.S. 333 (1968). Johnson v. Virginia, 373 U.S. 61 (1963).

Respondents submit that a holding by this Court now that some racial classifications are permissible would entail grave consequences. This would necessarily arise from a holding that school boards could assign pupils on a racial basis to accomplish racial balance. In this respect, we have previously pointed out in our brief that the underlying sociological premise supporting such state action in the lower court cases upholding it is the doctrine that the conceded disparity of achievement by minority pupils[1] is attributable to the lack of cultural advantages in the home and neighborhood environment. Therefore, the argument goes, the minority child can be improved and accorded "equal educational opportunity," 55 Cornell LR 594 (1970), only by removing him to the better environment of white schools, thereby enabling him to associate with white children who have had all the advantages of a culturally enriched home.[2] Hobson v.

1. See Coleman Report; p. 20.

2. It is interesting to observe that this sociological doctrine, which is seriously being urged by many otherwise responsible people, comes very close to the notion of Plato that all wives and children should be held in common, characterized by this Court in Meyer v. Nebraska, 262 U.S. 390, 401-2 (1923) as the inevitable consequence of acceptance of the doctrine that the state is empowered to standardize all children.

Hansen, 269 F. Supp. 401 (D.C. D.C. 1967), vacated, 408 F2d 175 (1969); Branch v. Board of Education, 204 F. Supp. 150 (D.C. N.Y. 1962); Barksdale v. Springfield School Committee, 237 F. Supp. 543 (D.C. Mass. 1965), disapproved, 348 F2d 261 (C.A. 1st 1965); Spangler v. Pasadena Board of Education, 311 F. Supp. 501 (D.C. Cal. 1970); Jackson v. Pasadena School District, 59 Cal. 2d 876, 382 P2d 878 (1963); Blocker v. Board of Education of Manhasset, 226 F. Supp. 208 (D.C. N.Y. 1964); Davis v. School District of Pontiac, 309 F. Supp. 734 (D.C. Mich. 1970); United States v. School District 151, 301 F. Supp. 201, 205 (D.C. Ill. 1969); Keyes v. School District No. 1 of Denver, 313 F. Supp. 90, 96-7 (D.C. Colo. 1970); Swann v. Charlotte-Mecklenburg Board of Education, 300 F. Supp. 1358 (D.C. N.C. 1968); S.C., 306 F. Supp. 1291 (1969); S.C., 306 F. Supp. 1299 (1968

If such a doctrine is now seriously urged, which by no means is a settled one, see 5 Harv. Civil Liberties L.R. 488, 494 (1970), 43 So. Calif. L.R. 275 (1970), it would be an open invitation for some litigant to attack the underlying premise - that disparate Negro achievement is attributable to environmental factors - by attempting to establish judicially that these disparities are in fact attributable to genetic factors. This has already been attempted in several cases. See Stell v. Savannah-Chatham County Board of Education, 220 F. Supp.

667 (D.C. Ga. 1963), rev'd. 333 F2d 55 (C.A. 5th 1955); Jackson Municipal Separate School District v. Evers, 357 F2d 653 (C.A. 5th 1966).

In other words, any effort by this Court to draw a line between racial classifications deemed benign and those deemed hostile, and thereby to uphold the one and invalidate the other, might well require that the Court adjudicate the age-old controversy of racial supremacy - a "sticky-mess"-which no court should attempt ever to do, and which recalls to mind the undesirable consequences which ensued the last time this Court undertook such a task in Dred Scott v. Sanford, 19 How. 393, 15 L.Ed. 691, 701 (1857).

A holding that racial classifications are per se unconstitutional avoids the necessity for a court having to decide such delicate issues as this - issues which courts are not equipped to decide. See, Viera, "Racial Imbalance, Black Separatism and Permissible Classification by Race," 67 Mich. L.R. 1553, 1611-12 (1969).

If racial classifications are per se invalid as contended for here, it would follow that Congress could not legislate otherwise under the enforcement clause (§5) any more than Congress could pass an Act reversing Brown. See Katzenbach v. Morgan, 384 U.S. 641, 651, fn. 10; United States v. Harris, 106 U.S. 629 (1883). Of course, even

assuming that racial classifications are not per se invalid, it does not follow that what a state or Congress might do is also the measure of the obligation of a state under the Fourteenth Amendment when the state or Congress has not seen fit to act. Katzenbach v. Morgan, supra (384 U.S. at 648-9).

We repeat: The paramount issue in all these cases now before the Court is not bussing, but whether the Constitution requires integration or merely prohibits state-enforced segregation. A resolution of this issue would therefore be determinative of all the media concludendi, such as bussing, racial balance, ratios, quotas, and the legality of the all-black school. Notwithstanding the professed reliance by the plaintiffs in the Mobile and Charlotte cases upon the de jure doctrine and the propriety of remedial devices for formerly de jure systems, we submit that a close examination reveals that in fact the Court is being urged to formulate constitutional doctrine based upon concepts of educational opportunity which the Court in a subsequent case will be asked to extend to all school systems, formerly de jure or otherwise.

(2) Congressional Legislation on The Subject

In addition to those federal statutes prohibiting racial balance which are cited in respondents' original brief, see also 20 USCA

884. The "anti bussing" philosophy was also written into the Model Cities Act by Congress. See 42 USCA, Sections 3303 (d) and 3335(f).

(3) The De Facto - De Jure Distinction

This doctrine is to the effect that while race ordinarily can not be used as the basis of assigning pupils to school, it must be used in a formerly de jure system so as to overcome the effects of past discrimination. This doctrine thus is relied upon (1) As a means of excepting all formerly de jure systems from the "anti bussing" prohibitions of federal law, 42 USCA, Sections 2000c, 2000c-6; 20 USCA, Sections 242, 884, and (2) As a basis for requiring, as remedial provisions, the affirmative assignment of pupils to schools on the basis of race, including the requirement that stated percentages or quotas be achieved.

This distinction is not a valid one for the following reasons:

(1) Why should 1954 be the determinative date? As this Court observed in Brown, "[E]lsewhere in the North segregation in public education has persisted in some communities until recent years." 347 U.S. at 491, f.n. 6. It existed in Indiana until 1949, Bell v. School City of Gary, 213 F. Supp. 819, 822 (1963) and in Cincinnati until 1955. Deal v. Cincinnati Board of Education, 419 F2d 1387, 1391

(C.A. 6th 1969). See also 23 Ga. B.J. at p. 24 et seq., where the status of school segregation in all states both before and after the Fourteenth Amendment is reviewed.

(2) Congress has spoken against such disparate treatment in the Green Amendment, 20 USCA 888.

(3) Even in states previously having no state-enforced segregation, some evidences of discrimination can almost always be found in related areas, such as state court enforcement of restrictive covenants, zoning, and private residential development. See Fiss, "Racial Imbalance in the Public Schools: The Constitutional Concepts", 78 Harv. L.R. 564 (1965); Wright, "Public School Desegregation: Legal Remedies For De Facto Segregation," 40 N.Y. U.L.R. 285 (1965); and other articles cited in 11 ALR 3d 783. Studies have also been published lately showing that federal agencies followed policies of segregation in public housing and urban renewal programs until only a few years ago. Under Gaston County v. United States, 395 U.S. 285 (1969), this Court held that discrimination is presumed to have some effect 60 years after the fact.

(4) From the standpoint of the minority pupil, racial isolation is no different whether occurring in Georgia or New York. To the child, then, the distinction is irrelevant.

(5) Whatever the efficacy of the distinction as far as conferring power against the school board, it can not justify depriving the objecting white and black children of the same rights of non-discrimination which the racial assignment seeks to confer upon consenting children. "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals". Shelley v. Kramer, 334 U.S. 1, 22 (1948).

We do not offer these observations as a basis for holding that compulsory racial assignments should be required in all 50 states, but rather to show (1) That they should not be required anywhere; otherwise, the effect is to impose sanctions on a retroactive basis for conditions which were legal when brought into existence, compare Monroe v. Board of Commissioners of Jackson, 380 F2d 955, 958 (C.A. 6th 1967), and (2) That if such retroactive treatment is to be imposed, it should be a rule for all 50 states and not just 17.

(4) The Supremacy Clause Argument.

Counsel for petitioners in the Charlotte case advanced the argument that the Supremacy Clause of the Constitution justifies racial assignments to overcome the effects of discrimination.

This argument is not valid for these reasons:

(1) It erroneously assumes that the rights of one group who object can be violated in order to accord benefits to another group which consents.

(2) It erroneously assumes that racial assignments and racial balance are the only ways of overcoming the effects of past discrimination. This is not so. Congress has not so determined, and in every instance when it has spoken on the subject, has decided to the contrary.

CONCLUSION

Compulsory integration is wrong for the same reason that compulsory segregation was wrong. They both constitute a dehumanizing impingement upon freedom in an area where government has no right to encroach.

Brown was rightfully heralded as ushering in a new dimension of liberty. It is today sought to be distorted into an instrument of oppression no less pernicious than that which it abolished.

We respectfully submit that this cannot come to pass as long as this court sits.

Aside from this, whatever rule this court finally announces, we ask that it apply alike to all 50 states, for as stated by a district court in

Louisiana, there can be no such thing as true constitutional government in these United States if the constitution is held to mean one thing in 17 states and something else in 33 other states.

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CERTIFICATE OF SERVICE

I hereby certify that I have, prior to filing, served copy of the foregoing Motion and Reply Brief upon Mr. Eugene Epting, Erwin, Epting Gibson & Chilivis, P. O. Box 1587, Athens, Georgia 30601, Attorneys for Petitioners, by mail, duly addressed and postage prepaid.

This 16th day of October, 1970.

E. Freeman Leverett

Attorney for Respondents

Syllabus

McDANIEL, SUPERINTENDENT OF SCHOOLS, ET AL. *v.* BARRESI ET AL.

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 420. Argued October 13, 1970—Decided April 20, 1971

The Board of Education of Clarke County, Ga. (with a two-to-one white-Negro elementary school system ratio), devised a student assignment plan for desegregating elementary schools which establishes geographic zones drawn to promote desegregation and also provides that pupils in heavily concentrated Negro "pockets" walk or go by bus to schools in other attendance zones. The resulting Negro elementary enrollment ranges from 20% to 40% in all but two schools, where it is 50%. Respondent parents sued to enjoin the plan's operation. The state trial court denied an injunction. The Georgia Supreme Court reversed, holding that the plan violated (1) equal protection because it "[treated] students differently because of their race," and (2) the Civil Rights Act of 1964, because Title IV prohibits a school board from requiring busing to achieve a racial balance. *Held:*

1. In compliance with its duty to convert to a unitary system, the school board properly took race into account in fixing the attendance lines. P. 41.

2. Title IV, a direction to federal officials, does not restrict state officials in assigning students within their systems. Pp. 41–42.

226 Ga. 456, 175 S. E. 2d 649, reversed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Eugene A. Epting argued the cause and filed a brief for petitioners.

E. Freeman Leverett argued the cause and filed a brief for respondents.

Briefs of *amici curiae* were filed by *Solicitor General Griswold* and *Assistant Attorney General Leonard* for the United States, and by *Arthur K. Bolton*, Attorney General, *Harold N. Hill, Jr.*, Executive Assistant Attorney General, and *Alfred L. Evans, Jr.*, and *J. Lee Perry*, Assistant Attorneys General, for the State of Georgia.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to review a state court order enjoining the operation of a school desegregation plan. The action was brought in the Superior Court of Clarke County, Georgia, by parents of children attending public elementary schools in that county. Named as defendants were the Superintendent of Education and members of the Clarke County Board of Education. The trial court denied respondents' request for an injunction, but on appeal the Supreme Court of Georgia reversed, 226 Ga. 456, 175 S. E. 2d 649 (1970). This Court then granted certiorari, 400 U. S. 804 (1970).

Beginning in 1963, the Clarke County Board of Education began a voluntary program to desegregate its public schools. The student-assignment plan presently at issue, involving only elementary schools, has been in effect since the start of the 1969 academic year. The plan, adopted by the Board of Education and approved by the Department of Health, Education, and Welfare,[1] relies primarily upon geographic attendance zones drawn to achieve greater racial balance. Additionally, the pupils in five heavily Negro "pockets" either walk or are transported by bus to schools located in other attendance zones.[2] As a consequence the Negro enrollment of each

[1] It may well be that the Board of Education adopted the present student-assignment plan because of urgings of federal officials and fear of losing federal financial assistance. The state trial court, however, made no findings on these matters. No federal officials are parties in this case.

[2] Where the distance between the student's residence and his assigned school is more than 1½ miles, free transportation is provided. There is no challenge here to the feasibility of the transportation provisions of the plan. The annual transportation expenses of the present plan are reported in the record to be $11,070 less than the school system spent on transportation during the 1968–1969 school year under dual operation.

elementary school in the system varies generally between 20% and 40%, although two schools have a 50% Negro enrollment. The white-Negro ratio of elementary pupils in the system is approximately two to one.

Respondents contend in this action that the board's desegregation plan violates the Fourteenth Amendment of the Federal Constitution and Title IV of the Civil Rights Act of 1964. The Supreme Court of Georgia upheld both contentions, concluding first that the plan violated the Equal Protection Clause "by treating students differently because of their race." The court concluded also that Title IV prohibited the board from "requiring the transportation of pupils or students from one school to another . . . in order to achieve such racial balance . . . ." We reject these contentions.

The Clarke County Board of Education, as part of its affirmative duty to disestablish the dual school system, properly took into account the race of its elementary school children in drawing attendance lines. To have done otherwise would have severely hampered the board's ability to deal effectively with the task at hand. School boards that operated dual school systems are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* v. *County School Board*, 391 U. S. 430, 437–438 (1968). In this remedial process, steps will almost invariably require that students be assigned "differently because of their race." See *Swann* v. *Charlotte-Mecklenburg Board of Education, ante*, p. 1; *Youngblood* v. *Board of Public Instruction*, 430 F. 2d 625, 630 (CA5 1970). Any other approach would freeze the status quo that is the very target of all desegregation processes.

Nor is the board's plan barred by Title IV of the Civil Rights Act of 1964. The sections relied upon by respondents (42 U. S. C. §§ 2000c (b), 2000c–6) are di-

rected only at federal officials and are designed simply to foreclose any interpretation of the Act as expanding the powers of federal officials to enforce the Equal Protection Clause. *Swann, supra,* at 17. Title IV clearly does not restrict state school authorities in the exercise of their discretionary powers to assign students within their school systems.

Reversed.